Supreme Court, U.S.
FILED
05108 2005
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

THE MERCY HOSPITAL, INC.,

Petitioner,

v.

MASSACHUSETTS NURSES ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A hospital nurse who had withdrawn excess drugs and failed to document their administration and disposal was terminated by the Petitioner. An arbitrator ruled that the nurse should be reinstated despite findings that she had acted in violation of state law governing controlled substances and nursing practice. The questions presented are:

1. Whether an arbitration award violates public policy, where an arbitrator reinstates a registered nurse who has violated statutory and regulatory mandates of nursing practice with regard to controlled substances, thereby preventing a hospital from enforcing appropriate controls on drug use.

2. Whether an arbitration award should be vacated as a violation of public policy where its effect is to prohibit an employer from enforcing compliance with the law.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, The Mercy Hospital, Inc., is a non-profit Massachusetts corporation. Its sole member is Sisters of Providence Health System, Inc., a non-profit Massachusetts corporation whose sole member is *Catholic Health East*, a non-profit Pennsylvania corporation.

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OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 429 F.3d, 338 (1st Cir., 2005) (Pet. App. A). The Memorandum and Order of the District Court of Massachusetts is reported at 2005 WL 578949 (D. Mass 2005) (not reported in F. Supp.) (Pet. App. B). The Report and Recommendation of the Magistrate has not been reported and is attached as Pet. App. C.

JURISDICTION

The date of the order and judgment of the Court of Appeals for the First Circuit sought to be reviewed is November 21, 2005.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTE, RULES AND REGULATIONS

Petitioner relies generally on 29 U.S.C. §301 of the National Labor Relations Act and specifically on 244 C.M.R. §9.03 4 (a)(10), (35), (37), (38) and (39) which are set forth at pages 8, 9, 10.

STATEMENT OF THE CASE

This is an action to vacate an arbitration award under 29 U.S.C. §301 and 9 U.S.C. §10. The complaint was filed in the District Court of Massachusetts on January 23, 2004. The parties filed cross motions to vacate or confirm the arbitration award. The motions were referred to the Magistrate Judge for a Report and Recommendation. The

Magistrate Judge recommended confirmation of the award (Pet. App. C). On February 2, 2005, the plaintiff/petitioner filed an objection to the Report and Recommendation. On March 9, 2005, the District Court issued a Memorandum and Order adopting the Report and Recommendation and entering judgment for the defendant. Plaintiff/Petitioner appealed to the Court of Appeals for the First Circuit. The First Court issued its opinion on November 21, 2005, affirming the District Court decision.

STATEMENT OF FACTS

The petitioner, Mercy Hospital ("Mercy"), and the defendant, the Massachusetts Nurses Association ("MNA"), are parties to a collective bargaining agreement. Mercy is an acute care hospital in Springfield, Massachusetts, and the MNA represents a unit of all registered nurses.

On August 29, 2002, Mercy terminated Registered Nurse Nancy Dufault. The MNA filed a grievance on her behalf and after denial of the grievance through its contractual steps, the MNA filed for arbitration pursuant to the collective bargaining agreement. The arbitrator ruled in favor of the grievant and ordered her reinstated with back pay.

The following facts were found by the arbitrator. The grievant, a registered nurse, worked the night shift (7 p.m. to 7 a.m.) in the Intensive Care Unit where she dealt with critically ill patients in need of medication and other drugs such as Ativan and morphine (Pet. App. D p. 35a). (These drugs are controlled substances whose use, and access to, is strictly controlled under state and federal law. *See e.g.* 21 U.S.C. §301 *et seq.*, 21 U.S.C. §801 *et seq.*, M.G.L. c. 94C §1-48, M.G.L. c. 112 §80B, 244 C.M.R. §9.03).

The hospital had a computerized system to monitor and control access to and use of the controlled substances, known by its commercial name, Omnicell. The Omnicell controlled access to the drugs by tracking the nurse, patient, drug and amount that were removed at any given time (Pet. App. D p. 36a).

The hospital still maintained a separate computerized documentation system for the administration of the drugs, known as the Medical Administration Record (MAR or SMS) (Pet. App. D p. 36a) and nurses also could make notations on a patient's flow sheet (Pet. App. D p. 36a). In June 2002 a hospital supervisor, pursuant to its obligation to monitor and supervise the use of controlled substances, discovered discrepancies in the Omnicell records for Nancy Dufault (Pet. App. D pp. 36a-37a). The discrepancies involved large amounts of Ativan being withdrawn over and above the amount prescribed or required (Pet. App. D pp. 36a-37a). At first the supervisor accepted Mrs. Dufault's explanation, deferring to Dufault's experience (Pet.App. D pp. 36a-37a). But the discrepancies reappeared, and the supervisor had an investigation done of the medical records and the Omnicell records regarding Dufault (Pet. App. pp. 36a-37a). The results of that study led the Director of Medical/Surgical Nursing, Mary Brown, to place Dufault on administrative leave pending further investigation (Pet. App. D p. 37a). Dufault was informed that the basis for the leave was an investigation that showed that more drugs had been withdrawn from the Omnicell than had been administered to the patient (Pet. App. D pp. 37a-39a). The grievant herself at that time recalled at least one instance where she had removed "multiple vials of Ativan" (Pet. App. p. 38a).[1]

1. Although it is not explicitly stated in the opinion, it is both undisputed and implicit in the findings that the discrepancies at issue

(Cont'd)